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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~841~~ 23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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Opinion Below

The opinion of the court below is as yet unreported and is set forth in the appendix, p. 29, *infra.*

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of the district court was invoked under 28 U. S. C. §§1331(a), 1343(3)(4), 2201, 2202; 42 U. S. C. §§1981, 1983, 1988, 1994, 2000d and 2000e; and the Fifth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint sought, *inter alia,* to enjoin the continued en-

forcement and operation of Georgia's constitutional and statutory scheme for the selection of jurors and members of county boards of education. A statutory three-judge court was convened pursuant to 28 U. S. C. §§2281, 2284.

An opinion and order finding "no merit in the three-judge district court questions presented" (*infra*, p. 36) was entered August 5, 1968 and a final judgment and decree entered on September 19, 1968 (*infra*, p. 38). Timely notice of appeal to this Court was filed in the court below on October 14, 1968. On December 2, 1968, Mr. Justice Black extended the time for filing a Jurisdictional Statement to and including February 8, 1969.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1253 to review the judgment of the district court. That court was properly convened pursuant to 28 U. S. C. §2281 because the action seeks to restrain enforcement of state statutes and constitutional provisions on the ground that they violate the Federal Constitution. See e.g., *Idlewild Bon Voyage Liquor Corporation* v. *Epstein*, 370 U. S. 713 (1962).

Constitutional and Statutory Provisions Involved

The Georgia constitutional and statutory provisions involved in this litigation are the following: Article VIII, Section V, paragraph I, of the Georgia Constitution of 1945 (Title 2, Section 6801, Georgia Code Annotated); Sections 32-902, 32-902.1, 32-903, 32-905, 59-101, and 59-106 of Georgia Code Annotated. These enactments are set out in full in the appendix to this statement at pp. 40-45, *infra*.

This action also involves the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Questions Presented

1. Whether Georgia's restriction of service on juries to the "upright and intelligent" and on jury commissions to the "discreet" violates the Fourteenth Amendment where both provisions provide an "opportunity to discriminate" racially which has been "resorted to"?

2. Whether the Georgia system of selection of school board members violates the Thirteenth, Fourteenth and Fifteenth Amendments where Negroes constitute over sixty percent of the population, fifty percent of the electorate, and all of those attending public schools, but only a disproportionate minority of those who appoint board members?

3. Whether Georgia's restriction of service on ~~juries~~ school boards to freeholders violates the Fourteenth Amendment?

Statement

A. *Introduction*

Despite the fact that approximately 62% of the residents and 50% of the registered voters in Taliaferro County, Georgia are Negro (*infra*, pp. 31, 32)[1] (II-132)[2] and all of

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[1] Citations to the transcript of the first hearing in the district court are as follows: (I-). Citations to the second hearing are shown as: (II-).

[2] According to Census of Population, 1960, Table 27, pp. 12-130, and Table 28, pp. 12-148, the population of the county is:

White	1,273
Negro	2,096
White (over 21)	877
Negro (over 21)	979
White (over 18)	917
Negro (over 18)	1,073

the teachers and children who attend public schools of the country are Negro (Admissions 8, 11), the five-man county school board never had a Negro member until one was appointed as a consequence of this litigation (I-15, 37; II-6, 7; Admissions 4, 5, 6). (School board members are selected by the county grand jury by a process described *infra*, p. 7.) The white children of the county fled the system several years ago to attend private schools or public schools in other counties as part of "an effort to avoid desegregating the school system of Taliaferro County." *Turner* v. *Goolsby*, 255 F. Supp. 724, 731 (S. D. Ga. 1965). The *Turner* opinion describes in detail the complicity of the board of education and school superintendent in "the expenditure of . . . public funds for transporting the white children to adjoining counties" (255 F. Supp. at 729) as well as their part in an alleged "conspiracy . . . to have secretly and covertly arranged for all the white children to leave the county for school in other counties . . . " (255 F. Supp. at 727-28). The district court in *Turner* attempted to halt these practices by taking control from the board and placing the system in receivership. The receivership, however, was terminated several months later without any of the white children returning, and they have still not returned to the system (Admission 8). None of the defendant board members themselves had children attending the public schools (Admission 7); both members with children sent them to schools in another county (I-83).

Negro parents believed that they were unable to alter continued operation of a segregated school system, and that the white school board was, at worst, hostile and, at best, unresponsive to the needs and desires of the students actually attending the schools (I-155). The experience of

Negro parents that the school board would not even listen to their opinions and grievances strengthened that belief (I-127). Repeated attempts by appellant Calvin Turner and members of the Voters League, a civic group, to appear at school board meetings were unsuccessful. The time of scheduled meetings could not be determined despite attempts to obtain information from the board chairman (I-125-6, 143). When reached by phone his attitude was brusque and unhelpful (I-151, 152). A registered letter sent to him went unanswered (I-125-6). A change in the time of regular board meetings went unpublicized, contrary to law (II-104).

One parent, Mrs. Mary Allen, was invited to visit her child's classroom by the Negro principal. After the white superintendent observed Mrs. Allen in class, the classroom teacher was told: "Miss Hadden, discontinue this class until the parents (sic) leave" (I-168). Mrs. Allen subsequently asked to be allowed to organize a parents-teachers association in order to "have some kind of communication with the teacher" (I-173). The principal of the high school informed her that this could not be done because the superintendent had refused permission (I-173). When a group of parents attempted to appeal that decision, and present other grievances to the board, the board abruptly adjourned its meeting without responding to any of the complaints. The course of the meeting was described at trial (I-177):

> "Judge Bell: How long did you stay in there?
>
> The Witness: About ten minutes.
>
> Judge Bell: And then they moved that the meeting be adjourned?
>
> The Witness: That's right, and put the heater out. They had the heater on and a gentleman put the heater

out and we walked out. He started putting the lights out too and we walked out and then they closed the door.

Judge Bell: Did they give you an answer at all as to your complaints?

The Witness: No answer.

Judge Bell: No answer?

The Witness: No, sir.

Judge Bell: Have you had one since then?

The Witness: No, sir."

Mrs. Allen stated her opinion of the school system as follows:

"You can't even talk with the teacher, and can't go and sit in the classroom and can't talk to the board, can't talk to anybody, nothing about your problems" (I-178).

Shortly after her experience with the school board she moved to another county for the benefit of her child. Her purpose in moving, she said, was "to get communication" (I-178).

B. *Initiation of Litigation*

On November 15, 1967, appellants, a registered Negro voter residing in Taliaferro County, his daughter, a student in the public schools of the county, and a Negro resident of the county who is not a freeholder brought this action against members of the board of education, jury commission and grand jury of the county. Appellants alleged that they, and others similarly situated, were denied rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution by the operation

of statutory and constitutional provisions of the State of Georgia which authorize an intertwined and multi-layered scheme for the selection of school board members and jurors. Appellants contended, *inter alia*, that: (1) they had been denied an opportunity to serve as grand and traverse jurors on account of race (complaint para. 11(d)); (2) because of the power vested in the grand jury to select school board members, they had been denied on account of race an opportunity to participate in the process of selecting the officials who administer the schools of the county (complaint, para. 11(a), (b)); and (3) they had been denied on account of their poverty, and the requirement that school board members be freeholders, the opportunity to actually serve as board members (complaint 11(b)). Because appellants sought injunctive relief restraining the enforcement of state statutes and constitutional provisions, a three judge court was empanelled pursuant to 28 U. S. C. §§2281, 2284.

C. *The Selection of Jurors and Board Members*

The challenged selection process for the grand jury and school board members begins when a judge of the Superior Court, elected by the voters of a six county circuit, appoints six jury commissioners from among the "discreet" members of the community (II-58; Ga. Code Ann., Tit. 59 §101). These commissioners, who for at least the last 50 years have always been white (Admissions 1, 2 and 3; I-35, 36), then compile a list from among registered voters who are "upright and intelligent citizens of the county" to serve as grand and traverse jurors (Ga. Code Ann. Tit. 59 §106; Art. VIII, §V, ¶I, Ga. Constitution; Ga. Code Ann.

Tit. 2 §6801). The grand jury drawn from this list selects "from the citizens of their . . . count[y], five freeholders, who shall constitute the county board of education" (Art. VII, §V, ¶I, Ga. Constitution; Ga. Code Ann., Tit. 32 §902). The operation of this system is statewide, except in those counties altering it "by local or special law conditioned upon approval by a majority of the qualified voters of the county voting in a referendum thereon" (Ga. Code Ann., Tit. 2 §6801).

At the first of two hearings in the district court, evidence was introduced showing that on the jury list most recently composed, 56 out of a total of 328 eligible traverse jurors (or 17%) were Negroes (I-118; Plaintiffs' Exhibit I) and 11 out of 130 on the grand jury list (or 8.5%) were Negroes. The district court concluded that systematic exclusion of Negroes was taking place and condemned the practice:

> "We all know what systematic exclusion is, and when there is as many registered Negro voters in a county as whites and you have 130 to 11 on the grand jury, why that's systematic exclusion, and that will have to be corrected" (I-200).

The court adjourned the hearing after informing defendants of the court's power to enjoin racial discrimination if a remedy were not devised (I-200, 203).

At the second hearing defendants submitted a report describing a recomposition of the jury lists without first notifying counsel for appellants of its contents (II-9). 113 of the 304[3] persons said to be on the new traverse jury list

[3] Disqualifications left 608 names on the list. Since fewer were needed, the jury commission alphabetized the remaining names and discarded every other one reducing the final list to 304 persons.

were Negroes (37%) and 44 of 121 persons on the grand jury list were Negroes (36%). 32 persons were initially selected for the grand jury, of whom 9 (or 28%) were Negro. Of the 23 persons actually selected to serve on the grand jury, after 9 persons were excused, 6 (or 26%) were Negro (II-6). In composing these jury lists, defendants claimed they started with a roll of all the registered voters in the county, eliminated from consideration several classes of persons found to be ineligible, and finally arrived at a list of persons they deemed fully eligible to serve as jurors. 178 persons excluded were as not conforming to the statutory requirement that jurors be "upright and intelligent." 171, or 96%, of those excluded by the commissioners were Negro. The precise criteria used to define uprightness and intelligence if any, were undetermined[4] (II-27-32).

At the first hearing Judge Bell remarked that the absence of Negroes on the board of education "simply will not do" and stated pointedly that it would be wise if the school board filled its vacancies with "two outstanding Negroes . . . if you don't want to do that we will know that on the 23rd [of February]" (I-201). Two vacancies existed on the school board at the time of the hearing. At the new grand jury's first meeting it confirmed the school board's appointment of one Negro and one white to fill the vacancies.[5]

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[4] For example, the Jury Commission Chairman testified that he did not know whether any persons were found to lack a sufficiently upright character because of having been convicted of a traffic violation (II-32).

[5] The grand jury is authorized to appoint members to the board except in the case of vacancies occurring for reasons other than expiration of a term. Such appointments are to be made by the remaining school board members subject to ratification by the grand jury at its next meeting (Ga. Code Ann., Tit. 2 §6801). The vacancies existing at the time of trial were of the latter type.

The revision of the jury list and the filling of the school board vacancies, were both accomplished without public notice of any kind being posted and without "any effort to contact anybody or any parents in Taliaferro County" (II-24, 108). Appellant Turner testified that the Negro who had been selected under these conditions was unrepresentative of the Negro community (II-147, 151), and that if Negroes had been afforded an opportunity to choose, they would have selected someone far more qualified educationally, and otherwise, to serve (II-151):

> "Mr. Casper Evans was taken from the lower bracket, the very lowest bracket of those persons who have attained a education" (II-153).[6]

D. *Opinion of the District Court*

On August 5, 1968, the district court entered its opinion. The court stated that "the thrust of the complaint is that Negroes have no voice in school management and affairs" (*infra*, p. 30) and it concluded that the reconstitution of the grand jury was adequate relief. The court upheld the validity of all the challenged state statutes and constitutional provisions and denied relief, other than the grant of a general injunction against the systematic exclusion of Negroes from grand juries. The court held that nothing in the contested statutes themselves "contemplates or permits . . . systematic exclusion from the grand juries" and it affirmed their constitutionality both on their face and as applied (*infra*, p. 35). The Court did refer to appellants'

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[6] "I submit", said Mr. Turner, of the 72 year old man with a third grade education who was chosen, "that it is the community that he represents, and the people in that community . . . knew nothing about the election of Mr. Evans, and . . . this certainly wouldn't be the democratic process" (II-139, 147).

prayer that the system be placed in receivership "pending the selection of new county school board members on a constitutionally acceptable basis" (complaint, prayer 5). Appellants' contention that their rights to equal protection of the laws were violated by reason of the total exclusion of non-freeholders as members of the board of education of the county was rejected:

> "[t]here was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise" (*infra*, p. 36).

Appellants filed timely notice of appeal to this Court on October 14, 1968.

The Questions Presented Are Substantial

I.

Ga. Code Ann., Tit. 59 §§101, 106 Are Unconstitutionally Vague and Discriminate Against Negroes by Permitting Their Arbitrary Exclusion From Service as Jury Commissioners and Jurors in Violation of the Fourteenth Amendment to the Constitution of the United States.

Challenges to racial discrimination in the selection of jurors have usually been mounted by persons indicted and convicted by juries from which Negroes were excluded. In recent years, numerous civil suits have been brought to require jury selection officials to eliminate race from the process of selection, e.g., *Mitchell* v. *Johnson*, 250 F. Supp. 117 (M. D. Ala. 1966). The present action not only seeks to enjoin racial jury selection but challenges the vague

selection statutes themselves, for it is plain that until the unlimited discretion placed in the hands of local officials by such statutes is confined by objective standards nonracial selection is unlikely.[7] The Fifth Circuit has said: "It is this broad discretion located in a non-judicial office which provides the source of discrimination in the selection of juries."[8] *Labat* v. *Bennett,* 365 F. 2d 698, 713 (5th

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[7] See Kuhn, "Jury Discrimination: The Next Phase," 41 U. S. C. Law Rev. 235, 266-82 (1968).

[8] The following state statutes require jurors to be of a certain moral character:

Alabama Code Tit. 30 §21 (1959): "all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment. . . ."

Arizona Rev. Stat. Ann. (1956) §21-201: ". . . sober and intelligent, of sound mind and good moral character. . . ."

Arkansas Stat. Ann. (1962): §39-101 Grand Juror: ". . . temperate and of good character. . . ." §39-206 Other Jurors: "persons of good character, of approved integrity, sound judgment and reasonably informed. . . ." See also §39-208: same as 206 and applies to grand jurors.

Connecticut Gen. Stat. Ann. (Supp. 1965): §51-217: ". . . esteemed in their community as persons of good character, approved integrity, sound judgment and fair education. . . ."

Florida Stat. Ann. (1961) Tit. 5 §40.01: "law abiding citizens of approved integrity, good character, sound judgment and intelligence. . . ."

Illinois Ann. Stat. (Smith-Hurd Supp. 1966) Tit. 78 §2: "of fair character, of approved integrity, of sound judgment, well-informed. . . ."

Iowa Code Ann. (1950) §601.1: "of good moral character, sound judgment. . . ."

Kansas Stat. Ann. (1964) §43-102: "possessed of fair character and approved integrity. . . ."

Louisiana Rev. Stat. Ann. (1950) §13-3041: "of well known good character and standing in the community. . . ."

Maine Rev. Stat. Ann. tit. 14 §1254 (Supp. 1965): "of good moral character, of approved integrity, of sound judgment and well-informed. . . ."

(*footnote continued on next page*)

Cir. en banc 1966); see also *Smith* v. *Texas*, 311 U. S. 128 (1940); *Rabinowitz* v. *United States*, 366 F. 2d 34 (5th Cir. en banc 1966).

Recently in *Whitus* v. *Georgia*, 385 U. S. 545, 552 (1967) and *Bostick* v. *South Carolina*, 386 U. S. 479 (1967) this Court condemned statutes which injected race into the selection of jurymen because they provided an "opportunity to discriminate." The vague and subjective intelligence and character standards challenged here provide a similar "opportunity to discriminate," an opportunity which was employed by selection officials, both before and after this litigation was commenced. Although the number of white and Negro voters in the county were substantially the same, only 11 of 130 of those on the grand

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Maryland Ann. Code Art. 51 (Supp. 1966) §9: "with special reference to the intelligence, sobriety and integrity of such persons."

Michigan Stat. Ann. (Supp. 1965) §27A.1202: "of good character, of approved integrity, of sound judgment, well informed."

Missouri Ann. Stat. (Supp. 1966) §494.010: "sober and intelligent, of good reputation".

Nebraska Rev. Stat. (1964) §25-1601: "intelligent, of fair character, of approved integrity, well informed".

New York Judic. Law (Supp. 1966) §504(5): "of good character, of approved integrity, of sound judgment".

North Carolina Gen. Stat. (1953) §9-1: "of good moral character and have sufficient intelligence to serve".

Oklahoma Stat. Ann. tit. 38 (Supp. 1966) §28: "of sound mind and discretion, of good moral character".

South Carolina Code Ann. (1962) §38-52: "of good moral character".

Texas Rev. Civ. Stat. Ann. (1964) §2133: "of sound mind and good moral character".

West Virginia Code Ann. (1966) §52-1-4: "of sound judgment, of good moral character".

Wisconsin Stat. Ann. (1957) §255.01(5): "esteemed in their communities as of good character and sound judgment".

jury list were Negro until suit was filed (*infra*, p. 32). During the recomposition process, 96% of the persons found by the jury commissioners not to be "upright and intelligent citizens" were Negro. All the "discreet" persons selected to be jury commissioners over a period of 50 years have been white. It is apparent that the inherent vagueness of the provisions involved at the very least serve as a convenient mask for discrimination.

Georgia law creates two levels at which virtually unlimited discretion is delegated to persons possessing appointive powers. First, the discretion of the judge of the Superior Court is such that he can disqualify from eligibility for the office of jury commissioner anyone he deems not to be "discreet" (Ga. Code Ann., Tit. 59 §101). Second, the discretion of the jury commissioners is such that they may disqualify from eligibility for service as jurors anyone they find not to be an "upright and intelligent citizen" (Ga. Code Ann., Tit. 59 §106). Section 106 further provides that if at any time *"it appears to the jury commissioners"* that the jury list is not a fairly representative cross-section of the "upright and intelligent citizens" of the county, they shall supplement the list by "going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significantly identifiable group in the county which may not be fairly represented thereon." (Emphasis supplied.) Thus the statute first provides the jury commissioners with "the opportunity to discriminate," then charges the very same persons with the power to determine subjectively whether in fact the opportunity "was resorted to" (*Whitus, supra*, 385 U. S. 552) and should be remedied.

It is settled, however, that when constitutional rights are involved officials may not exercise a discretion which consists solely of their own judgment unguided by statutory or other guidelines. In other spheres of governmental activity this Court has declared similar language permitting public officials to make subjective decisions unconstitutionally vague: "unreasonable charges" *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); "unreasonable profits" *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); "reasonable time" *Herndon* v. *Lowry*, 301 U. S. 242 (1937); "sacrilegious" *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); "so massed as to become vehicles for excitement" (a limiting interpretation of "indecent or obscene") *Winters* v. *New York*, 333 U. S. 507 (1948); "immoral" *Commercial Pictures Corp.* v. *Regents of University of New York* reported with *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587 (1954); "an act likely to produce violence" in *Edwards* v. *South Carolina*, 373 U. S. 229 (1963); "subversive person" in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); "reprehensive in some respect"; "improper"; and outrageous to "morality and justice" *Giaccio* v. *Pennsylvania*, 383 U. S. 339 (1966). See also *Staub* v. *City of Baxley*, 355 U. S. 313 (1958); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 312, 313 (1966);[9] *Louisiana* v. *United States*, 380 U. S. 145, 153 (1965); see also *United States* v. *Atkins*, 323 F. 2d 733, 742-743 (5th Cir. 1963); *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala.)

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[9] Dealing with voting qualifications imposed by South Carolina Law similar to those of Sections 101 and 106, the Court declared in *Katzenbach*, 383 U. S. at 312-313:

> ". . . the good morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."

aff'd per curiam, 336 U. S. 933 (1949); *Board of Supervisors* v. *Ludley*, 252 F. 2d, 372, 74 (5th Cir. 1958).

Requirements of specificity are at least as necessary in a selection system for jurors because "exclusion from jury service is at war without basic concepts of a democratic society." *Smith* v. *Texas*, 311 U. S. 128, 130 (1940) and because, as is true with racial discrimination in voting[10] (an analogy especially pertinent here in light of the dual role of the grand jury system), excessive discretion in the hands of local officials thwarts nonracial selection. *Smith* v. *Texas, supra; Labat* v. *Bennett, supra*, at 365 F. 2d 712, 713. Furthermore, while injunctions against racial selection methods may be sufficient to prevent blatant acts of discriminatory exclusion, more subtle forms of the practice survive and will continue to survive as long as such tools remain available. At the first hearing of this cause, the lower court, in effect, ordered recomposition of Taliaferro County jury list on a non-discriminatory basis. While the result was an increase in Negro selection, an overwhelming proportion of those excluded as not "upright and intelligent citizens" were Negro. Thus, under the existing statutory scheme it may well be possible to eliminate the total exclusion but not the racial limitation of Negroes from the jury rolls. It is not, however, only exclusion but limitation on the basis of race which the Constitution prohibits: "Discriminations against a race by barring *or limiting* citizens of that race from participation in jury service are odious to our thought and our Constitution" (emphasis added). *Brown* v. *Allen*, 344

[10] Condemnation of discretion in the hands of state voting officials is the heart of two recent decisions of the Court. See *United States* v. *Mississippi*, 380 U. S. 128 (1965) and *Louisiana* v. *United States*, 380 U. S. 145 (1965).

U. S. 433, 470-471 (1953) citing *Brunson* v. *North Carolina*, 333 U. S. 851 (1948); *Cassell* v. *Texas*, 339 U. S. 282, 286, 287 (1950).[11]

It may well be that the jury commissioners in this county truly believe that of all the registered voters who are by reason of faulty intelligence or character ineligible to serve as jurors, 96% are Negroes. They cannot be enjoined from that *belief*. It *is* possible, however, for them to be prohibited from bringing such opinions, similar to those branded a "violent presumption" in *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881), to bear upon decisions as to who should be selected as jurors. As was true in *Louisiana* v. *United States*, "the vice cannot be cured by an injunction enjoining its unfair application" 380 U. S. 145, 150 n. 9 (1965), but only by prohibiting the use of a vague and subjective standard.

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[11] That an unconstitutional *limitation* of Negroes has taken place in Taliaferro County is shown by the fact that in compiling a new list of jurors, the jury commissioners had 304 names (113 Negroes or 37%; 191 whites or 63%) remaining after randomly discarding half the registered voters not disqualified. One of the statutory standards of disqualification, the character test, in effect, operated to exclude Negroes only: Of the 178 persons excluded, 171 were Negro, 7 were white. Thus prior to application of the character test there was approximately a 50-50 percentage breakdown reflected on the lists if we assume, as is likely, that the random number discarded merely halved the numbers of the whites and Negroes on the initial list. As of all those disqualified by the test, 96% were Negro, the result of the test's application was to reduce the Negro representation on the revised list from approximately 50% (the proportion of Negro voters) to 37%.

II.

Georgia Constitutional and Statutory Provisions for Selection of School Board Members Operate in Taliaferro County to Exclude Negroes From Participation in the Selection of Board Members in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Although Negroes constitute about 60% of the residents and 50% of the registered voters in Taliaferro County, they long have been virtually excluded from jury service. Because the county grand jury appoints members of the school board, Negroes were also excluded from membership although since 1965, the public schools have been attended and staffed solely by Negroes, county whites sending their children to private school or to other counties to avoid desegregation. After a hearing in the district court established blatant disregard of Negroes' constitutional rights, the jury commissioners recomposed the jury list as follows:

113 Negroes	37%
191 whites	63%

A new grand jury was chosen from this list composed of:

6 Negroes	26%
17 whites	74%

The new grand jury then selected one Negro and one white to fill two vacancies on the board of education leaving the board with four whites and, for the first time in at least 50 years, a Negro.

Appellants contend in section I, *supra*, that the jury list, as revised, violates the Fourteenth Amendment because it was revised pursuant to unconstitutionally vague state constitutional and statutory provisions which provide an opportunity to discriminate on the basis of race. But regardless of whether appellants' contentions with respect to the vagueness of Georgia jury selection statutes are correct, the system of selecting grand jurors in Taliaferro County must fall for the reason that the grand jury plays the essentially political role of selecting school board members. In short, even if equality of representation of the races may not be required in selecting eligible jurors, stricter requirements of fair representation apply here: "the theme of the Constitution is equality among citizens in the exercise of their political rights." *MacDougall* v. *Green*, 335 U. S. 281, 290 (1948) (Mr. Justice Douglas dissenting) cited with approval in *Reynolds* v. *Sims*, 377 U. S. 533, 564 fn. 41 (1964).

While the particular system of selection of board members involved does not provide for direct election, that fact does not diminish the rights of Negroes to be afforded full and equal participation in it. *Sailors* v. *Board of Education of Kent County*, 387 U. S. 105 (1967) illustrates the principle that the right of states to regulate their political subdivisions may in no instance validate racial discrimination. There a system for selection of school board officials was held not subject to "one man, one vote" requirements, the latter being held to be subordinate to the right of states to use appointive, non-representative methods, for the choosing of administrative officials. But this Court was careful to distinguish racial discrimination in the political process from the *Sailors* holding (387 U. S. at 108-109):

> "A State cannot, of course, manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race. [footnote omitted] *Gomillion* v. *Lightfoot*, 364 U. S. 339, 345."

Certainly this exception to the *Sailors* rule prohibits state action to dilute the influence of Negroes in the class of citizens choosing, appointing *or* electing members of a political body. It can hardly be argued that the policy of the Thirteenth, Fourteenth, and Fifteenth Amendments contemplates permissible exclusions of Negroes from a political process merely because the particular form of selection involved is not a general election. The primary purpose of those Amendments, recognized in numerous decisions of this Court,[12] is to undo the effects of slavery upon the civil rights of the Negro race. That purpose is subverted by permitting exclusion of Negroes from *any* political process, whether or not a regular election. Mr. Justice Black, concurring, stated the essential nature of the prohibited evil in *Terry* v. *Adams*, where the scheme invalidated stripped "Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens," 345 U. S. 461, 470 (1953). *Terry* voided the "pre-primary endorsement elections of a privately run organization on the ground that since that endorsement virtually assured eventual election of the person supported, the state could not permit the exclusion of Negroes from the endorsement vote. Such exclusion was disallowed, even though not tak-

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[12] See *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948) and cases cited in footnote 30, *Nixon* v. *Condon*, 286 U. S. 73, 89 (1932), *Nixon* v. *Herndon*, 273 U. S. 536, 540-541 (1927).

ing place at a general or even primary election, simply because its real effect was that described by Mr. Justice Black.

In Taliaferro County, the method for selection of board members prevents the Negro community from effectively influencing the choice of officials whose decisions critically affect the lives of themselves and their children. While constituting one half of the voters of the county, and all of the school children, the effect of the system of selection is to render them a minority of those who select board members. In *Reynolds* v. *Sims, supra,* this Court stated that "since the right to franchise in a free and unimpaired manner is *preservative of other basic civil and political rights,* any alleged infringement of the right to vote must be carefully and meticulously scrutinized." 377 U. S. at 562 (emphasis added). The "basic civil and political rights" of Negroes in Taliaferro County, in particular their right to a school system undiluted by segregation or control by those who have no interest in educational quality, are jeopardized by infringement of their power to select school officials. The evil is not diminished because *all* Negroes have not been precluded from participation in the selection process. "(D)ilution of Negro voting power . . . is just as discriminatory as complete disfranchisement or total segregation." *Sims* v. *Baggett,* 247 F. Supp. 96, 109 (M. D. Ala. 1965); to the same effect see also *Smith* v. *Paris,* 257 F. Supp. 901 (M. D. Ala., N. D. 1966) aff'd and modified as to collateral matter, 386 F. 2d 979 (5th Cir. 1967).[13]

[13] The *Sailors* rule does not negate the relevance of all aspects of reapportionment law for that case implied what *Sims* v. *Baggett, supra,* states explicitly that "the Constitution itself requires a distinction between . . . political . . . gerrymandering and gerry-

Nor is the injury to appellants lessened by the fact that a Negro was finally put on the school board after the first hearing in this cause. There is no evidence that the person selected was anything but a token appointment by the grand jury under pressure of this action. Appellant Turner testified that the individual selected is not representative of the Negro community. In any case, the essence of appellants' claim is that they, and the class they represent, are limited in their power of *choosing* board members; that claim is in no way weakened by the fact that the school board *might* have appointed someone who also *might* have been chosen if the Negro community had the electoral power to which it is entitled. To paraphrase *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960) the inescapable effect of this long established scheme is to despoil Negro citizens, and only them, of their right to participate meaningfully in the selection of school board members.

Where Negroes have been deprived of their political rights the remedy has been invalidation of the discriminatory features of the system, e.g., *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Smith* v. *Allwright*, 321 U. S. 649 (1944). Where a vague delegation of power has been the mechanism involved, the delegation has been abolished, *Louisiana* v. *U. S.*, *supra*. In addition to such relief, appellants also sought appointment of a receiver to operate the school system until a constitutional system selecting board members could be instituted. The district court erred funda-

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mandering for the purpose of racial discrimination" (247 F. Supp. at 105). For the view that *all* civil rights of Negroes are in a distinct position in the protective scheme of the Fourteenth Amendment, see cases cited in footnote 12, *supra; Slaughter House Cases*, 83 U. S. 36, 81 (1873); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 682 dissenting opinion of Mr. Justice Harlan n. 3 (1966).

mentally in not adopting one of the available remedies which would eliminate diminution of Negro political rights.

In this case the deprivation of political power through the layers of discretion authorized by the statutory selection scheme powerfully affects "matters that intimately touch the daily lives of citizens," *Terry, supra.* The proper education of their children has been recognized time and again as of crucial importance to the Negro race since *Brown* v. *Board of Education*, 347 U. S. 483 (1954). That interest cannot be adequately protected within the context of an administrative structure which is subject to total domination by the white community, a community which has continually and consistently shown itself hostile to the interests and rights of Negroes. Only three years ago white resistance to integration of the schools was so great as to necessitate a federal court to order placement of the system in receivership. Since the termination of that takeover no change in white community sentiment has been manifested. There is no evidence in the record of any significant attempt by that community, or its school board, to reverse the exodus of white students from the public schools. The school board refuses to even listen to the grievances of the Negro parents whose children do attend the schools. In such circumstances, the Georgia scheme for selecting school board members operates in this county to deprive appellants of rights guaranteed by the Constitution.

III.

The State's Restriction of Membership on County Boards of Education to Freeholders Violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a state—whether in the exaction of pains or in the allowance of benefits—must not be irrelevant, arbitrary, or invidious. Where a state chooses to grant an advantage to one class and not to others "[t]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the action in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado and Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, 159 (1897). See e.g., *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Baxstrom* v. *Herold*, 383 U. S. 107 (1966). Georgia's constitutional and statutory limitation on the right to serve as a school board member to "five freeholders" (Ga. Code Ann. Tit. 2, §6801; Tit. 32, §902) is clearly in violation of these requirements for such a limitation is palpably arbitrary and wholly irrelevant to the achievement of any legitimate state objective. The Georgia property test is as irrational standard for membership on a county school board as was the poll tax as a test of voting qualifications, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966).

The court below did not conclude that the freeholder requirement bore a reasonable relationship to any legitimate incident of school board membership. In sustaining the freehold qualification, the court held only that there was

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property. In *Pierce* v. *Ossining*, —— F. Supp. —— (No. 68 Civ. 4150, S. D. N. Y., decided Nov. 1, 1968), the property requirement struck down was a prerequisite to voting in a town election, and in *Landes* v. *Town of Hempstead*, 231 N. E. 2d 120, 20 N. Y. 2d 417 (1967), the New York Court of Appeals rejected a property requirement as a limitation on the right to hold office. These decisions rely upon the clear import of *Harper* that statutory burdens on the poor are facially suspect and to be upheld only when the state demonstrates a compelling justification:

> [L]ines drawn on the basis of wealth or property, like those of race (*Korematsu* v. *United States*, 323 U. S. 214, 216, 89 L. ed. 194, 198, 65 S. Ct. 193), are traditionally disfavored [citing *Edwards* v. *California*, 314 U. S. 160, 184-185 (1941); *Griffin, supra;* and *Douglas* v. *California*, 372 U. S. 353 (1963)] (383 U. S. at 668).

Even if distinctions based on wealth may at times be justified, the freeholder requirement involved here cannot withstand constitutional attack for it has no rational relationship to the duties of members of the board of education. It might, perhaps, be argued that real property owners have a special interest in, or competence with respect to, the collection of taxes which support the schools. Assuming, arguendo, that the state might broadly exclude all non-freeholders from board membership for such a reason, the Georgia restriction is not thereby sustainable. The board of education does not itself collect any school taxes, Ga. Code Ann. Tit. 32, §1127, or set tax rates. (The board may only *recommend* a school tax rate to the responsible county authorities, Ga. Code Ann. Tit. 32, §1118.) The property which is potentially subject to the tax is by no means limited to that of individual freeholders, for the

property of corporations, both real and personal, is subject to assessment for school purposes, Ga. Code Ann., Tit. 32, §1116. Moreover, the budget of the Taliaferro school system includes but a small proportion of funds raised by ad valorem taxes ($39,000 out of a total of $267,611.65). (Answers of Defendants Cranston Jones et al. to Interrogatories, answers 26 and 27.) The remainder of the school budget comes from a variety of state and federal sources. A further indication that school board members are so limited in their financial levying power as to make the freehold qualification without relevance to their powers and duties is the limit on school tax rates to be found in the Georgia Constitution, which restricts a county board to a levy of no greater than 20 mills per dollar of assessed value unless recourse is had to the voters of the county. Georgia Code Ann., Tit. 2 §7501; *Commissioners of Chatham County* v. *Savannah Electric and Power Company*, 112 S. E. 2d 665, 215 Ga. 636 (1960).

Appellants contend, therefore, that the court below erred in not finding as the New York Court of Appeals found for town government that "it is impossible . . . to find any rational connection between qualifications for administering [school] affairs and ownership of real property" *Landes* v. *Town of Hempstead*, 20 N. Y. 2d at 421. We emphasize that nothing appellants urge detracts in the least from the power of the states to assure that competent persons administer the public schools. In *Abington School District* v. *Schempp*, 374 U. S. 203 (1963) for example, this Court recognized the special stake parents have in the proper administration of their schools by granting them standing to contest unconstitutional practices taking place in them. Georgia law does not, however, recognize a group

with a special concern for the schools by limiting board members to freeholders; on the contrary, it vests membership in a group with no such special concern. Where an interest as vital as the operation and management of the schools is involved, a state violates the Equal Protection Clause by restricting control of its educational establishment to those who own a particular class of property.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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